Supreme Court, U.S.
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No. 95-982

In The Supreme Court of the United States

October Term, 1995

ROBERT A. MCWHORTER,

Petitioner,

vs

GRIEVANCE ADMINISTRATOR,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Michigan

BRIEF IN OPPOSITION To The Petition For Writ Of Certiorari

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

ISSUE I.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE THE "EX POST FACTO" CLAUSE OF ART. 1, SEC. 10 OF THE UNITED STATES CONSTITUTION?

ISSUE II.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE "DOUBLE JEOPARDY" PROVISIONS OF THE UNITED STATES CONSTITUTION?

ISSUE III.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ISSUE IV.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE THE "EQUAL PROTECTION" CLAUSE OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF THE CASE

This case involves the decision of a state supreme court denying reinstatement of a law license to a former attorney who was disbarred after being convicted of serious criminal offenses in both state and federal courts. The state disciplinary rules provide that a former attorney petitioning for reinstatement must prove by clear and convincing evidence that he or she meets specific criteria relating to his or her fitness to practice law. Even though a hearing panel determined that the petitioner met those criteria, the court concluded that not enough time had passed since the petitioner had been released from parole supervision in order to properly evaluate his rehabilitation. Determining that the seriousness of the misconduct which led to disbarment required an examination of this petitioner's conduct over a substantial period of time when he was not subject to parole supervision, the court further held that he could not reapply for reinstatement until five years after his release from parole. The disbarred attorney asserts that the state court violated his various rights under the United States Constitution by denying him readmission and by prohibiting him from reapplying until five years after the termination of his parole.

Michigan Reinstatement Procedures

Article 6, Section 5 of the Michigan Constitution of 1963 empowers the Supreme Court to promulgate general rules which establish, modify, amend and simplify the practice and procedure in all courts of this state. Pursuant to that authority, the Michigan Supreme Court has established rules to regulate and discipline members of the bar. In re Schlossberg v State Bar Grievance Board, 388 Mich 389, 200 NW2d 219 (1972). Rules concerning the investigation, prosecution and adjudication of allegations of misconduct, and the reinstatement to good standing after a suspension or disbarment, are set out in Subchapter 9.100 of the Michigan Court Rules (hereinafter, "MCR".) (Appendix

A). These rules are exclusive on attorney discipline matters. MCR 9.107.

Michigan has a bifurcated disciplinary system, with a separation between the prosecutorial and adjudicative functions. The Supreme Court appoints an Attorney Grievance Commission, which serves as its prosecution arm for discharge of its constitutional responsibility to supervise and discipline Michigan Attorneys. MCR 9.108(A)&(B). It also appoints a separate Attorney Discipline Board, which serves as the Court's adjudicative arm for its exclusive constitutional responsibility to supervise and discipline state attorneys. MCR 9.110(A)&(B).

A Grievance Administrator is appointed by the Supreme Court, and is empowered by the rules to investigate allegations of attorney misconduct, and to prosecute complaints authorized by the Attorney Grievance Commission within the disciplinary system. MCR 9.109(A)&(B). When a disbarred attorney petitions for reinstatement, the Grievance Administrator is required to investigate the petitioner's eligibility for reinstatement, and to report the findings in writing. MCR 9.124(C). The Grievance Administrator must also appear at the public hearing on the petition, and shall cross-examine the petitioner and present evidence bearing on his or her eligibility for reinstatement. MCR 9.124(C)&(D).

A disbarred attorney seeking reinstatement begins the process by a filing a petition and a personal history affidavit with the Supreme Court. MCR 9.124(A)&(B). A disbarred attorney may not file such a petition until five years have elapsed since revocation of the license. MCR 9.123(D)(2). If the petition and affidavit are facially sufficient, the matter is assigned to a hearing panel for adjudication. A hearing panel is composed of three attorneys, appointed by the Attorney Discipline Board. MCR 9.111(A). The hearing panel conducts a public hearing on the petition, and receives evidence relevant to the petitioner's eligibility for

reinstatement. MCR 9.111(B).

The ultimate issue adjudicated by the hearing panel is the petitioner's eligibility for reinstatement. The burden is on the petitioner to prove that he or she is fit to practice law in this state. The petitioner must establish, by clear and convincing evidence, that he or she meets all the criteria for reinstatement set forth in MCR 9.123(B)(1)-(9). That rule provides that the petitioner may be reinstated only if the evidence proves:

> (1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;
>
> (2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;
>
> (3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension;
>
> (4) he or she has complied fully with the order of discipline;
>
> (5) his or her conduct since the order of discipline has been exemplary and above reproach;
>
> (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;
>
> (7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and

> otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;
>
> (8) he or she is in compliance with the requirements of subrule (C), if applicable; and
>
> (9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

The subrule (C) referred to in MCR 9.123(B)(8) requires that a disbarred attorney must be recertified by the Michigan Board of Law Examiners before he or she may be reinstated to the practice of law. MCR 9.123(C).

Proceedings before the hearing panel are generally controlled by the rules governing practice and procedure in a nonjury civil action, and the Michigan Rules of Evidence apply. MCR 9.124(D); MCR 9.115(A). A petitioner is entitled to a plethora of procedural protections, including a method to seek disqualification of a panel member, a right to be represented by counsel, and a right to obtain process for the appearance of witnesses and production of documents. MCR 9.115(F)(2); MCR 9.115(E); MCR 9.115(I). After considering the evidence, the panel must enter an order granting or denying reinstatement and a written report which includes its findings of fact. MCR 9.124(D).

Both the Grievance Administrator and the petitioner have a right to appeal the hearing panel order to the Attorney Discipline Board. MCR 9.124(E); MCR 9.118(A). An appeal begins with a petition for review, which must be

filed within 21 days after the order is served. Upon timely filing of a petition for review, the Attorney Discipline Board issues an order to show cause, at a date and time specified, why the hearing panel order should not be affirmed. MCR 9.118(B). The order to show cause also establishes a briefing schedule for the parties.

The parties to the appeal must appear for oral argument. While the rules require only that such appeals are heard by a subboard of at least three members, the full Attorney Discipline Board routinely sits en banc to hear and decide appeals of hearing panel orders. MCR 9.118(C)(1). If the Attorney Discipline Board believes that additional testimony should be taken, it may refer the matter to a hearing panel or a master. The hearing panel or master must then develop an additional record and make a supplemental report. MCR 9.118(C)(2).

After such a review hearing, the Attorney Discipline Board may affirm, amend, reverse, or nullify the hearing panel order, in whole or in part, or may order other discipline. MCR 9.118(D). The final decision must be made on consideration of the whole record. MCR 9.118(C)(1). The Attorney Discipline Board reviews the hearing panel's decision for proper evidentiary support on the whole record, but it possesses a measure of discretion with regard to its ultimate decision. Grievance Administrator v August, 438 Mich 296 (1991).

A party aggrieved by a final order of the Attorney Discipline Board on the issue of reinstatement may apply for leave to appeal to the Michigan Supreme Court. MCR 9.122(A)(1). An application must include a written argument in support of the appellant's position on each question presented for review. MCR 7.302(A). Such an application must demonstrate that the decision of the Attorney Discipline Board is erroneous and will cause material injustice. MCR 7.302(B)(6). The adverse party may file an opposing brief, but there is no oral argument on

the application. MCR 7.302(D); MCR 7.302(F)(1). Review by the Supreme Court is discretionary. The Court may grant or deny the application, enter a final decision, or issue a peremptory order. MCR 7.302(F)(1). When an application for leave to appeal is granted, the parties may file briefs and appear before the court for oral argument. MCR 7.312(A); MCR 7.306.

When reviewing a decision of the Attorney Discipline Board, the Supreme Court determines whether the board's findings have proper evidentiary support on the whole record. State Bar Grievance Administrator v Estes, 390 Mich 585, 212 NW2d 903, 92 ALR 275 (1972). However, the Court remains mindful that the power to regulate and discipline members of the bar rests ultimately with it pursuant to the constitutional mandate. Grievance Administrator v August, supra, at 304.

The rules now provide for filing limitations on petitions for reinstatement. Effective March 1, 1994, a disbarred attorney who has been denied reinstatement may not file a new petition until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement.

Summary of Proceedings Below

Former Michigan attorney Robert A. McWhorter (hereinafter, "Petitioner") was disbarred as a result of a drug-related felony conviction in the United States District Court for the Western District of Michigan. He appealed that conviction to the United States Circuit Court for the 6th Circuit. While the appeal was pending, action continued on another non-related disciplinary proceeding. Petitioner was ultimately suspended from the practice of law for 121 days effective October 29, 1979 for misconduct in dealing with the funds of a client. The suspension became effective upon the denial of his appeal by the Michigan Supreme Court. State Bar v McWhorter (On Reh), 407 Mich 278 (1979).

On May 29, 1980, Petitioner was convicted in state court of the felonies of kidnapping and conspiracy to forcibly seize and kidnap another with the intent to extort money. The state court convictions pertained to incidents and charges different from the drug-related federal conviction. As a result of these state convictions, additional disciplinary proceedings were instituted.

The Sixth Circuit Court of Appeals ultimately granted Petitioner's appeal of the federal conviction, and remanded the matter back to the District Court for trial. As a result of this reversal, the Attorney Discipline Board entered an order on September 9, 1980 which vacated the disbarment. However, Petitioner was not reinstated to the practice of law upon the entry of the order vacating revocation. Under the procedures then in effect, an attorney suspended for more than 120 days could not be restored to good standing until he or she petitioned for reinstatement and established his or her fitness to practice law. GCR 1963, 972.2; GCR 1963, 973. Even though the disbarrment resulting from the federal conviction was vacated, Petitioner remained ineligible to practice because of the suspension for mishandling client funds which became effective on October 29, 1979.

Petitioner's law license was again revoked, effective February 24, 1981, as a result of his state felony convictions. Meanwhile, the federal charges came back before the United States District Court for trial. Petitioner was then convicted of conspiracy to import cocaine, unlawful manufacture of methamphetamine and conspiracy to distribute methamphetamine. A second appeal to the Sixth Circuit was unsuccessful, and these federal convictions were affirmed on October 29, 1982. United States v McWhorter, 705 F2d 459 (6th Cir. 1982). Because Petitioner's law license was already revoked as a result of the state convictions, no additional disciplinary proceedings were instituted after the federal convictions.

Petitioner was sentenced on the federal conviction to

ten years imprisonment with a special two year parole term. The state convictions resulted in a consecutive sentence, with Petitioner serving his entire incarceration within federal facilities.

On April 6, 1992, after Petitioner was released from incarceration, but while he was still on parole, he petitioned for reinstatement to the practice of law. Because more than five years had lapsed since his disbarment, and his petition and affidavit were facially sufficient, the Attorney Discipline Board assigned the matter to Tri-County Hearing Panel #15 for adjudication.

Public hearings were held on four separate dates between August 12, 1992 and November 9, 1992. During the period while the matter remained pending before the panel, Petitioner was released from federal parole. His parole expired on June 28, 1992.

The panel issued a report and Conditional Order Of Reinstatement on April 7, 1993. In a 2-1 split, the hearing panel found that Petitioner had established by clear and convincing evidence the criteria for reinstatement set out at MCR 9.123(B). Among the conditions imposed by the panel were that Petitioner pay costs, pay dues to the State Bar of Michigan, be recertified by the Michigan Board of Law Examiners, and that he be monitored for a period of no less than one year to ensure continuation of weekly therapy sessions and church activity. In a sharply worded dissent, one panel member expressed her belief that the criteria of MCR 9.123(B)(6) and MCR 9.123(B)(7) had not been met. The dissenter actually concurred with the findings of the majority on all but these two criteria. She was not satisfied that Petitioner had established, by clear and convincing evidence, that he could be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and

officer of the court. Likewise, she did not believe that Petitioner established, by clear and convincing evidence, that he had a proper understanding of, and attitude toward, the standards that are imposed on members of the bar.

The Grievance Administrator appealed the reinstatement to the Attorney Discipline Board, and Petitioner filed a cross-appeal seeking the elimination of the conditions imposed by the panel. The Attorney Discipline Board issued an order requiring the parties to appear on May 6, 1993 to show cause why the reinstatement with conditions should not be affirmed. Prior to the scheduled hearing date, the Attorney Discipline Board, sua sponte, remanded the matter back to Tri-County Hearing Panel #15 to develop a record as to the nature and scope of Petitioner's supervision by federal authorities during the period of parole. The hearing panel took testimony on the question, and issued a supplemental report on December 13, 1993.

On May 20, 1994, the Attorney Discipline Board entered an Order Modifying Hearing Panel Order Of Reinstatement and a Board Opinion. The Board therein affirmed Petitioner's reinstatement, but vacated the conditions calling for continued therapy and church activity and monitoring of these requirements. In the Opinion, the Board stated that it decided the matter by balancing the standards previously enunciated by the Supreme Court. The Attorney Discipline Board thus reviewed the hearing panel's findings for proper evidentiary support, recognized the element of subjective judgment which is applicable to MCR 9.123(B), and exercised the measure of discretion granted to it by the Court in regard to its ultimate decision. The Board determined that under this standard of review the decision to reinstate Petitioner should be affirmed.

On June 4, 1994, the Grievance Administrator filed an application seeking leave to appeal the reinstatement with the Michigan Supreme Court, and requested that the reinstatement order be stayed pending the appeal. The Court

granted the request for a stay on August 24, 1994.

The Supreme Court granted the Grievance Administrator's application for leave to appeal, thus consenting to a discretionary review of the reinstatement, on October 19, 1994. The parties submitted briefs on the merits, and then appeared before the Court for oral argument on March 8, 1995. The Grievance Administrator argued both that the serious nature of the misconduct justified permanent disbarment and that an insufficient time had lapsed since Petitioner's release from parole to properly adjudge his fitness to practice law.

On July 5, 1995, a divided Court issued an opinion which reversed the Attorney Discipline Board and the hearing panel. The Court determined that the petition for reinstatement must be denied, and that petitioner may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. Writing for the court, Chief Justice Brickley stated that after reviewing the decisions of the hearing panel and the Attorney Discipline Board to determine if they were supported by the record as a whole, the Court found that there was a lack of evidentiary support for the conclusions that Petitioner had established the eligibility requirements of MCR 9.123(B)(6) and MCR 9.123(B)(7) by clear and convincing evidence.

The basis for this decision was that Petitioner simply had not spent enough time outside of parole supervision to enable a valid evaluation of his rehabilitation. As Justice Brickley phrased it:

> Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner had not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it

> is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may safely therefore be recommended for reinstatement. In re Petition For Reinstatement Of McWhorter, 449 Mich 130, 141 (1995).

The ruling that a valid evaluation of rehabilitation cannot be made until a disbarred attorney spends a sufficient time outside parole supervision begs the question as to what period of time is sufficient to enable a true evaluation. Recognizing that such a valid question arises from the decision, the Chief Justice went on to write:

> To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole. We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully evaluate his fitness to practice law. In re Petition For Reinstatement Of McWhorter, supra, at 142.

While only Justice Mallet joined with the Chief Justice in the Court's Opinion, the concurring opinions of other justices make it clear that a strong majority of the court accepts the ruling that a minimum five year period after release from parole supervision is necessary in order to properly evaluate the rehabilitation of an attorney who was

disbarred for serious criminal conduct. Justice Weaver concurred in the result reached by the lead opinion that Petitioner should not be reinstated at this time, but she wrote separately to express her view that he should be permanently disbarred, with no opportunity to ever reapply for reinstatement. Justice Riley, joined by Justice Boyle, wrote a separate concurring opinion which agreed with Justice Weaver's assessment that the record calls for Petitioner's permanent disbarment. However, recognizing that a majority of the Court does not accept the proposition that there should be "permanent" disbarment, Justices Riley and Boyle accept the imposition of a five year waiting period following release from parole.

Justice Cavanaugh concurred in the holding that Petitioner has not spent enough time outside of parole supervision to adequately demonstrate his eligibility for reinstatement under MCR 9.123(B)(6) and MCR 9.123(B)(7), but he disagreed with using a published opinion as the vehicle to set the five year minimum spacing for reapplication. He stated that he doesn't necessarily disagree with the five year ban, but rather believed that the proper way to impose such a new rule is by amending the court rules after notice and opportunity to comment in the manner provided in MCR 1.201.

Only Justice Levin dissented from the decision that Petitioner should be denied reinstatement at this time. Justice Levin would uphold the decision of the Attorney Discipline Board, believing that sufficient time has elapsed since Petitioner's offense and release from incarceration to determine his moral fitness to practice law.

In a timely manner after the issuance of this published opinion, Petitioner requested the Michigan Supreme Court's reconsideration on this matter. In his motion for rehearing, Petitioner asserted the constitutional issues of "due process", "equal protection", "ex post facto", and "double jeopardy". On September 19, 1995, the

Michigan Supreme Court denied rehearing by a 4-3 vote.

REASONS FOR DENYING THE WRIT

States have an important interest in, and have traditionally exercised extensive control over, the conduct of attorneys. Middlesex County Ethics Committee v Garden State Bar Association, et al. 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The Michigan Supreme Court has recognized its ability to license attorneys and regulate their practice as a valid exercise of the state's police power. In the Matter of Grimes, 414 Mich 483, 326 N.W.2d 380 (1982). The Court recognizes that the license to practice law is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice. MCR 9.103(A). In order to ensure that a previously disbarred attorney is fit to resume the practice of law, the Court has promulgated rules covering the criteria for reinstatement. MCR 9.123. Among such criteria are that the person seeking reinstatement establish, by clear and convincing evidence, that:

> (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards; and
>
> (7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust or confidence, and in general to aid in the administration of justice as a member of the

bar and officer of the court.

In Grievance Administrator v August, supra, the Michigan Supreme Court recognized that both the nature of the conduct for which an attorney was disbarred and the passage of time since disbarment are appropriate considerations when deciding if the person should be reinstated. The court expressly held that a disbarred attorney may be denied reinstatement on the grounds that sufficient time has not passed to determine the present fitness of the applicant for readmission, but such a denial should not be deemed a permanent disbarment.

In the present case, the Court clarified this prior holding by announcing a rule that when an attorney who was disbarred for serious criminal misconduct seeks reinstatement, a minimum period of five years from the expiration of parole supervision is necessary to make a valid evaluation of his or her eligibility under MCR 9.123(B)(6) and MCR 9.123(B)(7). The Court's holding does not change the criteria for reinstatement. It simply gives guidance on what minimum period of time outside of parole supervision is necessary to make a valid determination of sincere rehabilitation under the established criteria for reinstatement.

The holding in the case under review concerns the legitimate state interest of regulating members of the bar, and it does not violate Petitioner's rights under any provision of the United States Constitution.

I. Petitioner Fails To Demonstrate Any Violation Of The "Ex Post Facto" Clause Of Art. 1, Sec. 10 Of The United States Constituion.

Petitioner claims that the Michigan Supreme Court ruling which prohibits him from reapplying for reinstatement to the practice of law until five years after the expiration of his federal parole violates the constitutional prohibition on ex post facto laws. Such a claim is frivolous and completely

without merit. An ex post facto law is one which: (1) punishes as a crime an act previously committed, which was innocent when done; or (2) which makes more burdensome punishment for a crime after its commission; or (3) which deprives one charged with crime of any defense available according to law at time when the act was committed. Dobbert v Florida, 432 U.S. 282, 53 L.Ed. 2d 344, 97 S.Ct. 2290 (1977), reh den 434 U.S. 882, 54 L.Ed. 2d 166, 98 S. Ct. 246. Here Petitioner claims that the decision retroactively increases the penalty for his criminal acts, and thus makes more burdensome the punishment previously imposed upon him. Analysis shows that this argument is not supported in law. The decision of the Michigan Supreme Court simply presents a procedural change, and is thus not ex post facto. Furthermore, ex post facto prohibitions are limited to criminal matters, and do not apply to attorney discipline proceedings.

A. The Decision Requiring The Lapse Of Five Years From Expiration Of Parole Before A Disbarred Attorney Can Apply For Reinstatement, Imposed To Ensure A Sufficient Period Of Unsupervised Conduct Upon Which To Properly Evaluate Rehabilitation, Is A Procedural Change Which Is Not "Ex Post Facto".

The "ex post facto" prohibition applies to substantive matters, not to modes of procedure. Miller v Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 3541 (1987), People v Potts, 181 Mich App 311, 448 NW2d 820 (1989). Even though it may work to the disadvantage of a person, a procedural change is not "ex post facto." Dobbert v Florida, supra at 432 U.S. 293.

In the present case, any change imposed by the Court was clearly procedural. The holding simply alters the method by which it is determined whether a disbarred attorney has demonstrated fitness to be reinstated to the

practice of law. The sanction imposed on Petitioner for his serious misconduct was the revocation of his license to practice law, and there was no change in the quantum of discipline attached to his misconduct. Even prior to the decision in the present case, there was no automatic reinstatement after any specified period of time. Grievance Administrator v August, supra.

B. Ex Post Facto Prohibitions Are Limited To Criminal Matters, And Do Not Apply To Attorney Disciplinary Proceedings.

The phrase "ex post facto" is one that relates exclusively to criminal or penal statutes. Galvin v Press, 347 U.S. 522, 98 L.Ed 911, 74 S.Ct. 737 (1954), reh den 348 U.S. 852, 99 L.Ed. 671, 75 S.Ct. 17. As the Michigan Supreme Court stated, quoting 11 Am. Jur. P. 1179, § 351, in People v Chapman, 301 Mich 584, 601 (1942):

> 'The expression ex post facto laws is a technical one which was in use long before the Revolution and had acquired an appropriate meaning by legislators, lawyers, and authors. The phrase is one which relates exclusively to criminal or penal statutes.
>
> A statute providing for the restraint and care of the criminally insane, which was enacted after the commission of the crime, is not ex post facto because such a statute is not a criminal act, but rather one prescribing the treatment of insane persons.'

For the same reason, the decision of the Michigan Supreme Court cannot be "ex post facto". The decision concerns the criteria for reinstatement to the practice of law after a disbarment. Even though Petitioner's disbarment resulted from criminal acts, the holding of the Court does

not impose any "criminal" rule.

Several jurisdictions have expressly recognized that the ex post facto limitations do not apply to disciplinary proceedings because they are not penal in nature. Moity v Louisiana State Bar Association, et al., 414 Fed Supp 180 (E.D. LA, 1976); Matter of Seraphim, 97 Wis 2d 485, 294 NW 2d 485 (1980). As was stated in Matter of Leifer, 63 AD2d 174, 177, "It is well settled that ex post facto prohibitions are limited to criminal matters and that attorney disciplinary proceedings and sanctions are not criminal in nature."

In Michigan, the purpose of disciplinary proceedings is to protect the courts, the public and the legal profession. MCR 9.105. Disciplinary matters are not penal in nature, as the purpose of discipline cannot be punishment. Matter of Grimes, 414 Mich 483, 326 NW2d 380 (1982). Because Michigan attorney discipline proceedings, and the sanctions imposed after such proceedings, are not criminal in nature, the ex post facto prohibitions do not apply.

II. Petitioner Fails To Demonstrate Any "Double Jeopardy" Violation.

Petitioner alleges that the decision of the Michigan Supreme Court violates the "double jeopardy" clause because it constitutes a punishment and is not remedial in nature. However, he fails to indicate or explain how the decision twice puts him in jeopardy of life or limb.

The decision which denies him reinstatement to the practice of law imposes no new or additional sanction. Petitioner was disbarred in 1981. The decision does not change any conditions of his disbarment. Since the initial disbarment, Petitioner has always been subject to reinstatement criteria which would require him to establish, by clear and convincing evidence, that he is fit to resume the practice of law. The only change brought about by this opinion is a procedure intended to ensure that any decision

as to whether Petitioner has met the reinstatement criteria is based upon a valid foundation.

Petitioner's reliance on United States v Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) is totally misplaced. There is simply no rational basis to conclude that the intent or the effect of the new rule is to impose a "civil penalty" within the scope of that decision. The ultimate purpose of reinstatement proceedings is to ensure that a previously disbarred attorney seeking reinsatement to the practice of law meets the high standards expected of an attorney. It is not a device to inflict any further sanction on Petitioner for his prior transgressions.

III. Petitioner Fails To Demonstrate Any Violation Of The Fourteenth Amendment "Due Process" Clause.

"Due process" is not a technical concept with fixed requirements unrelated to time, place and circumstance. Rather it is a fexible concept, that calls for such procedural protections as a particular situation demands. Matthews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The requirements of due process depend on the nature of the proceeding and the character of the rights affected. Hunter v City of Ann Arbor, 325 F.Supp 847 (1971). Even where "due process" is mandated, a question remains as to what process is due. Drumright v Padzieski, 436 F Supp 310 (1977).

It has been recognized that a state cannot exclude a person from the practice of law in a manner, or for such reasons, that contravene the "due process" clause of the Fourteenth Amendment. Schware v Board of Bar Examiners of The State Of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). However, "due process" requirements are met when there is a valid basis for a finding that an applicant fails to meet the criteria required to hold a license to practice law. As the Court stated in Schware v Board of Bar Examiners of The State Of New

Mexico, supra at 353 U.S. 240,

> A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law....Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

In the present case, the Michigan Supreme Court determined that five years must lapse from the expiration of Petitioner's parole before he can reapply for reinstatement of his law license. This requirement clearly has a rational connection with Petitioner's fitness to practice law. A disbarred attorney must prove his or her fitness to be reinstated by clear and convincing evidence. The Court is simply recognizing that a person's true character might not be discerned from his or her conduct while subject to even token supervision by parole authorities. As the dissenting hearing panel member put it in the report:

> In addition, although the requisite five years for application of reinstatement have passed, petitioner was only released from parole on June 28, 1992. One must question whether petitioner's exemplary behavior has been due to his supervised living under parole or has he really been rehabilitated to the high level with which attorneys are held.

By imposing this five year requirement, the Michigan Supreme Court is only seeking to ensure that any decision as to whether an applicant for reinstatement has been truly rehabilitated is based on a proper foundation.

Contrary to Petitioner's assertions, the Michigan Supreme Court did not conduct a de novo hearing on the question as to whether Petitioner met the criteria for reinstatement. Rather, it reviewed the decisions of the Attorney Discipline Board and the hearing panel for proper evidentiary support on the whole record. Here the Court expressly held that there was a lack of evidentiary support for the findings that Petitioner established the reinstatement criteria of MCR 9.123(B)(6) and MCR 9.123(B)(7). Such a finding was based on the rational conclusion that Petitioner had not spent enough time outside of parole supervision to enable anyone to make a valid determination of his rehabilitation. As the Court clearly stated,

> We believe that a review of the entire record does not support the decision of the hearing panel or the Attorney Discipline Board to reinstate Petitioner Robert McWhorter to the practice of law in this state at this time. In re Petition for Reinstatement of Robert A. McWhorter, supra, at 132.

Petitioner's arguments that the Court's alleged noncompliance with legislative enactments constitutes a denial of due process is similarly not persuasive. The statutes cited by Petitioner, Michigan Compiled Laws 338.41 - 338.47, pertain only to those occupations and professions regulated by the executive branch of government. The Michigan Court Rules are exclusive on matters pertaining to attorney discipline. MCR 9.107(A). Attorney disciplinary proceedings are judicial in nature, and the power to discipline, like the power to admit an applicant to membership in the bar, rests exclusively within the judicial branch. Erdman v Stevens, 458 F.2d 1205 (2nd Cir, 1972).

IV. Petitioner Fails To Demonstrate Any "Equal Protection" Violation.

Petitioner asserts that he has been denied equal

protection of law because other similarly situated disbarred attorneys have not been refused reinstatement because of their "supervision status." As an example of the lack "equal treatment", Petitioner points to the decision reached in Matter of Callanan, 440 Mich 1207, 487 NW2d 750 (1992). He argues that the fact that the disbarred attorney in that case immediately reapplied for reinstatement after a denial of that application, and was actually reinstated although he had not spent five years outside parole supervision, demonstrates an "equal protection" violation. This argument has no merit.

First of all, it must be recognized that Petitioner was denied reinstatement because the record did not establish by clear and convincing evidence that he met the criteria of MCR 9.123(B)(6) and MCR 9.123(B)(7). All disbarred attorneys must meet the requirements of all the criteria set forth in MCR 9.123(B) before being reinstated to the practice of law. The only difference between Petitioner and other disbarred attorneys is that the Supreme Court's holding provides a method for deterimining whether this former attorney, who was disbarred for serious criminal misconduct, has spent an adequate amount of "unsupervised" time to enable a proper evaluation of his rehabilitation. Such a distinction has a rational basis.

Furthermore, Petitioner's reliance on the reinstatement of the disbarred attorney discussed in Matter of Callanan, supra, to demonstrate the lack of "equal protection" is completely misleading. While Mr. Callanan has been reinstated, the Grievance Administrator is appealing that reinstatement on the same basis as that pursued in the present case. The Michigan Supreme Court has recently issued an order which remanded the matter concerning that attorney to the Attorney Discipline Board for reconsideration in light of the present case. (Appendix B). Such an order certainly does not support Petitioner's argument that he has not received equal treatment.

The "equal protection" clause of the Fourteenth Amendment requires only equality of law, not equality of results. Massachusetts v Feeny, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). As the Court stated in Struble v DAIIE, 86 Mich App 245, 272 NW2d 617 (1978):

> The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution by duly constituted agents. Fox v Employment Security Comm., 379 Mich 579, 588, 153 NW2d 644 (1967). Equal protection of the law requires that all persons subject to particular legislation be treated alike under like circumstances and conditions, but the guarantee of equal protection of the law is not one of equality of operation or application to all citizens of the state. Grayson v Board of Accountancy, 27 Mich App 26, 31-32; 183 NW2d 424 (1970). The Equal Protection Clause precludes irrational discrimination as between persons or groups of persons in the incidence of a law but does not require situations which are different in fact or opinion to be treated in law as though they were the same. Goesaert v Cleary, 335 US 464; 69 S Ct 198; 93 L Ed 163 (1948).

All disbarred attorneys seeking reinstatement must meet the same requirements of MCR 9.123(B). The holding which prohibits this Petitioner from reapplying until five years from the lapse of parole is based on the rationale that it takes a significant period of "unsupervised" conduct to show a person's true character and fitness to practice law. Petitioner is not the victim of intentional or arbitrary discrimination.

RELIEF

WHEREFORE, Respondent respectfully prays that the Petition For Writ Of Certiorari be denied.

Respectfully Submitted

/S/

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January 22, 1996

CHAPTER 9. PROFESSIONAL DISCIPLINARY PROCEEDINGS

Including Amendments Received Through February 1, 1995

SUBCHAPTER 9.100 ATTORNEY GRIEVANCE COMMISSION; ATTORNEY DISCIPLINE BOARD

RULE 9.101 DEFINITIONS

As used in subchapter 9.100:

(1) "board" means the Attorney Discipline Board;

(2) "commission" means the Attorney Grievance Commission;

(3) "administrator" means the grievance administrator;

(4) "investigator" means a person designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;

(5) "attorney" means a person regularly licensed or specially admitted to practice law in Michigan;

(6) "respondent" means an attorney named in a request for investigation or complaint;

(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;

(8) "complaint" means the formal charge prepared by the administrator and filed with the board;

(9) "review" means examination by the board of a hearing panel's final order on petition by an aggrieved party;

(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by an aggrieved party;

(11) "grievance" means alleged misconduct;

(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction;

(13) "disbarment" means revocation of the license to practice law.

RULE 9.102 CONSTRUCTION; SEVERABILITY

(A) Construction. Subchapter 9.100 is to be liberally construed for the protection of the public, the courts, and the legal profession and applies to all pending matters of misconduct and reinstatement and to all future proceedings, even though the alleged misconduct occurred before the effective date of subchapter 9.100. Procedures must be as expeditious as possible.

(B) Severability. If a court finds a portion of subchapter 9.100 or its application to a person or circumstances invalid, the invalidity does not affect the remaining portions or other applications. To this end the rules are severable.

RULE 9.103 STANDARDS OF CONDUCT FOR ATTORNEYS

(A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the

administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar.

(C) Duty to Assist Administrator. An attorney shall assist the administrator in the investigation, prosecution, and disposition of a request for investigation or complaint filed with or by the administrator.

RULE 9.104 GROUNDS FOR DISCIPLINE IN GENERAL; ADJUDICATION ELSEWHERE

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of

professional responsibility adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

(8) contempt of the board or a hearing panel; or

(9) violation of an order of discipline.

Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

RULE 9.105 PURPOSE AND FUNDING OF DISCIPLINARY PROCEEDINGS

Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. Commissioners of the State Bar of

Michigan and other attorneys who are associated with a commissioner in the practice of law may not represent respondents in proceedings before the board, including preliminary discussions with commission employees prior to the filing of a request for investigation.

RULE 9.106 TYPES OF DISCIPLINE; MINIMUM DISCIPLINE; ADMONISHMENT

Misconduct is grounds for:

(1) revocation of the license to practice law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C);

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline; or

(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service

of the admonition, notify the commission in writing that respondent objects to the admonishment. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.

RULE 9.107 RULES EXCLUSIVE ON DISCIPLINE

(A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

(B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney.

RULE 9.108 ATTORNEY GRIEVANCE COMMISSION

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

(B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall

serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve a full term.

(D) Internal Rules.

(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.

(2) Five members constitute a quorum. The commission acts by majority vote of the members present.

(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.

(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The commission has the power and duty to

(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;

(3) supervise the administrator and his or her staff;

(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5) annually write a budget for the commission and the administrator's office (including compensation) and submit it to the Supreme Court for approval;

(6) submit to the Supreme Court proposed changes in these rules;

(7) annually submit to the Supreme Court a report summarizing the commission's activities during the past year; and

(8) perform other duties provided in these rules.

RULE 9.109 GRIEVANCE ADMINISTRATOR

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

(1) employ or retain attorneys, investigators, and staff with the approval of the commission;

(2) supervise the attorneys, investigators, and staff;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his or her own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; and

(8) perform other duties provided in these rules or assigned by the commission.

(C) Legal Counsel for the Administrator.

(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.

(2) Legal counsel may

(a) prepare and file complaints and notices of hearings;

(b) present evidence relating to complaints or petitions for reinstatement;

(c) prepare and file arguments and briefs;

(d) inform the administrator about the progress of cases assigned; and

(e) perform other duties assigned by the administrator.

RULE 9.110 ATTORNEY DISCIPLINE BOARD

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve a full term.

(D) Internal Rules.

(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.

(2) Five members constitute a quorum. The board acts by a majority vote of the members present.

(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.

(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The board has the power and duty to

(1) appoint an attorney to serve as its general counsel and executive director;

(2) appoint hearing panels and masters;

(3) assign a complaint to a hearing panel or to a master;

(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;

(5) discipline and reinstate attorneys under these rules;

(6) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

(7) annually write a budget for the board and submit it to the Supreme Court for approval;

(8) annually submit to the Supreme Court a report summarizing the board's activities during the past year; and

(9) submit to the Supreme Court proposed changes in these rules.

RULE 9.111 HEARING PANELS

(A) Composition; Quorum. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel.

(B) Powers and Duties. A hearing panel shall do the following:

(1) Hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order, under these rules.

(4) Report its actions to the board within 28 days after the conclusion of a hearing.

(5) Perform other duties provided by these rules.

RULE 9.112 REQUESTS FOR INVESTIGATION

(A) Availability to Public. The administrator shall furnish

a form for a request for investigation to a person who alleges misconduct against an attorney. Forms must be available to the public through each state bar office and county clerk's office. Use of the form is not required for filing a request for investigation.

(B) Form of Request. A request for investigation of alleged misconduct must

(1) be in writing;

(2) describe the alleged misconduct, including the approximate time and place of it;

(3) be signed by the complainant; and

(4) be filed with the administrator.

(C) Handling by Administrator.

(1) *Request for Investigation of Attorney.* After making a preliminary investigation, the administrator shall either

(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or

(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2) *Request for Investigation of Judge.* The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.

(3) *Request for Investigation of Member or Employee of Commission or Board.* Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(D) Subpoenas.

(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Documents or other tangible things so produced may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.

(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena

may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

RULE 9.113 ANSWER BY RESPONDENT

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(7).

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.

(C) Attorney-Client Privilege. A person who files a request for investigation of an attorney waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

RULE 9.114 ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER

(A) Action After Investigation. After an answer is filed or the time for filing expires, the administrator may assign the request and answer for further investigation or informal hearing. When investigation is complete, the administrator shall refer the request to the commission for its review. The commission may direct that a complaint be filed, that the request be dismissed, or that the respondent be admonished with his or her consent.

(B) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.

(C) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation dismissed by the commission without a hearing before a hearing panel.

(D) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

(1) The administrator may destroy the files or records relating to a request for investigation dismissed by the commission after 3 years have elapsed from the date of dismissal.

(2) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the

administrator may destroy the files or records after 3 years have elapsed from the date when they were created or acquired by the commission.

RULE 9.115 HEARING PANEL PROCEDURE

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.

(C) Service. Service of the complaint and all subsequent pleadings and orders must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107.

Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).

(2) A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by Attorney. The respondent may be represented by an attorney, who must enter an appearance.

(F) Prehearing Procedure.

(1) *Extensions.* If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) *Motion to Disqualify.*

(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that the member believes could be grounds for disqualification under the guidelines of MCR 2.003(B). The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party.

(b) Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of MCR 2.003.

(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(3) *Amendment of Pleadings.* The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.

(4) *Discovery.* Pretrial or discovery proceedings are not permitted, except as follows:

(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection and copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired.

Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.

(c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain

admissions or otherwise narrow the issues presented by the pleadings.

If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) *Discipline by Consent.* A respondent may offer to plead nolo contendere or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline and file the stipulation with the hearing panel. At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant. If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which

the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board, and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221.

(H) Respondent's Appearance. The respondent shall personally appear at the hearing and is subject to cross-examination as an opposite party under MCL 600.2161; MSA 27A.2161. If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to

be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(J) Decision.

(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined or admonished.

(2) Upon a finding of misconduct, the hearing panel shall conduct a separate hearing to determine the appropriate discipline. The hearing on discipline shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established.

(3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it

must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.

(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.

(M) Resignation by Respondent; Admission of Charges. An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of revocation.

RULE 9.116 HEARING PROCEDURE; JUDGES OTHER THAN MAGISTRATES AND REFEREES

(A) Application of This Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.

(B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.

(C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.

(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.

(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.

(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.

(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.

(3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.

(F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.

RULE 9.117 HEARING PROCEDURE BEFORE MASTER

If the board assigns a complaint to a master, the master shall hold a public hearing on the complaint and receive evidence. To the extent that MCR 9.115 may be applied, it governs procedure before a master. After the hearing, the master shall prepare a report containing

(1) a brief statement of the proceedings,

(2) findings of fact, and

(3) conclusions of law.

The master shall file the report with a hearing panel designated by the board and serve a copy on the administrator and the respondent. Within 14 days after the report is filed, the administrator or the respondent may file objections to the report and a supporting brief. The panel must determine if the record supports the findings of fact and conclusions of law and impose discipline, if warranted. Further proceedings are governed by MCR 9.118.

RULE 9.118 REVIEW OF ORDER OF HEARING PANEL

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.115, 9.116, 9.121 or 9.124. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.

(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review.

Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by a subboard or at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier.

(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. The board may grant a stay pending its decision on a motion for reconsideration. If the board grants a stay, the stay remains effective for 21 days

after the board enters its order granting or denying reconsideration. In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.

(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

RULE 9.119 CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEYS

(A) Notification to Clients. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, the transfer to inactive status or the nondisciplinary suspension, notify all of his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:

(1) the nature and duration of the discipline imposed, the transfer to inactive status, or the nondisciplinary suspension;

(2) the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;

(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;

(4) the location and identity of the custodian of the

clients' files and records, which will be made available to them or to substitute counsel;

(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended or inactive attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;

(6) the address to which all correspondence to the attorney may be addressed.

(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of revocation, suspension, or transfer to inactive status, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law.

(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of revocation, suspension, or transfer to inactive status pursuant to MCR 9.121, the disbarred, suspended, or inactive attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. A disbarred, suspended, or inactive attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of revocation or suspension and prior to its effective date, shall not accept any new retainer or engagement as

attorney for another in any new case or legal mater of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.

(E) Conduct After Effective Date of Order. An attorney who is disbarred or suspended, or who is transferred to inactive status pursuant to MCR 9.121 is, during the period of disbarment, suspension, or inactivity forbidden from:

(1) practicing law in any form;

(2) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and

(3) holding himself or herself out as an attorney by any means.

(F) Compensation of Disbarred, Suspended, or Inactive Attorney. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the revocation, suspension, or transfer to inactive status.

(G) Inventory. If the attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 was a member of a firm, the firm may continue to represent each client with the client's express written consent. If an attorney is transferred to inactive

status or is disbarred or suspended and fails to give notice under the rule, or disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appointing a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.

RULE 9.120 CONVICTION OF CRIMINAL OFFENSE

(A) Notification of the Grievance Administrator and the Attorney Discipline Board. When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

(B) Suspension.

(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.

(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.

(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States. The board shall then order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

(C) Pardon; Conviction Reversed. On a pardon the board may, and on a reversal the board must, by order filed and served under MCR 9.118(E), vacate the suspension. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge.

RULE 9.121 ATTORNEY DECLARED TO BE INCOMPETENT OR ALLEGED TO BE INCAPACITATED OR ASSERTING IMPAIRED ABILITY

(A) Adjudication by Court. If an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.

(B) Allegations of Incompetency or Incapacity.

(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.

(2) The hearing panel shall provide notice to the attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation.

(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.

(4) Pending disciplinary proceedings against the attorney must be held in abeyance.

(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

(C) Assertion of Impaired Ability; Probation.

(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that

> (a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
>
> (b) the impairment was the cause of or substantially

contributed to that conduct,

(c) the cause of the impairment is susceptible to treatment, and

(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment,

the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.

(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination by a physical selected by the hearing panel or the board, which physical shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

(3) The probation order may

(a) specify the treatment the respondent is to undergo,

(b) required the respondent to practice law only under the direct supervision of other attorneys, or

(c) include any other terms the evidence shows are likely to eliminate the impairment without subjected the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.

(4) The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed 2 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.

(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.

(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.

(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by the board on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. The board may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney by

qualified medical experts that the board designates. The board may direct at the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, the board may dispense with further evidence that the disability has been removed and may order reinstatements to active status on terms it finds proper and advisable, including recertification.

(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to the board written constant for each to divulge whatever information and record are requested by the board's medical experts.

RULE 9.122 REVIEW BY SUPREME COURT

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 21 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 21 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1) or 9.114(A), a party aggrieved by

the dismissal may file a complaint for mandamus in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

RULE 9.123 ELIGIBILITY FOR REINSTATEMENT

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

(B) Revocation or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more that 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the terms of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has compiled fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself of herself in conformity with those standards;

(7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he or she is in compliance with the requirements of subrule (C), if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar or Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney maybe reinstated to the practice of law.

(D) Petition for Reinstatement; Filing Limitations.

(1) An attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license.

(3) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement.

RULE 9.124 PROCEDURE FOR REINSTATEMENT

(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and

the commission. If the petition and the affidavit required by subrule (B)(1) are facially sufficient, and the petitioner has paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice.

(B) Petitioner's Responsibilities.

(1) The petitioner must file, contemporaneously with and as a part of the petition for reinstatements, a personal history affidavit containing the following information:

> (a) every residence address since the date of disqualification from the practice of law;
>
> (b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment;
>
> (c) a copy of a current driver's license;
>
> (d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;
>
> (e) bank account statements, from the date of disqualification until the filing of the petition for reinstatements, for each and every bank account in which petitioner is named in any capacity;
>
> (f) any and all professional or occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;

(g) any and all names used by petitioner since the time of disqualification;

(h) petitioner's place and date of birth;

(i) petitioner's social security number;

(j) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which such case occurred;

(k) whether there are any outstanding judgments against the petitioner;

(l) whether petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case occurred.

(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and personally history affidavit, remit to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.

(3) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners must file updated petitions and personal history affidavits with the hearing panel when the reinstatement hearing convenes. The supplemental findings must indicate any pertinent information that has changed since the previous filing.

(4) The petitioner must cooperate fully in the investigation

by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.

(C) Administrator's Responsibilities. Within 14 days after the commission received its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner. For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is not a pleading and does not serve to restrict the administrator in the presentation of evidence at the hearing. Any evidence omitted from the report or received by the administrator subsequent to the filing of the report must be disclosed promptly to the hearing panel and the petitioner.

(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions

regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F).

(E) Review. Review is available under the rules governing review of other hearing panel orders.

RULE 9.125 IMMUNITY

A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

RULES 9.126 OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS

(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's

answer thereto if a formal complaint has been filed.

(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)(5).

(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except

(1) the commission,

(2) the administrator,

(3) the respondent as provided under MCR 9.115(F)(4),

(4) members of hearing panels or the board,

(5) authorized employees,

(6) the Supreme Court, or

(7) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent.

(E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the

commission may disclose the substance of information concerning attorney or judicial misconduct to:

(1) the Judicial Tenure Commission,

(2) the Sate Bar of Michigan Client Security Fund,

(3) the Sate Bar of Michigan Committee on Judicial Qualification,

(4) any court-authorized attorney disciplinary or admissions agency, or

(5) other persons who are expressly authorized by the board or the Supreme Court.

(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all requests for disclosure that have been filed with the board pursuant to subrules (D)(7) and (E)(5). The accounting shall include the board's disposition of each request.

RULE 9.127 ENFORCEMENT

(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.

(B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition must be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order.

RULE 9.128 COSTS

(A) Suspension for Nonpayment of Costs. Within 14 days of the conclusion of a hearing before a panel, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, commission, and panel allocable to a hearing must be made a part of the report in all matters of discipline and reinstatement. The hearing panel and the board in an order for discipline or an order granting or denying reinstatement must direct the attorney to reimburse the State Bar of Michigan for the expenses of that hearing, review, and appeal, if any. Reimbursement must be a condition in a reinstatement order. If the respondent fails to reimburse the State Bar of Michigan for the expenses within the time prescribed, a certified report of the nonpayment must be filed with the Supreme Court, and the State Bar of Michigan, and a copy served upon the respondent. The respondent will be suspended automatically, effective 7 days from the mailing of the certified report, and until the respondent pays the costs or the board approves a suitable plan for payment. An attorney who is suspended for nonpayment of costs under this rule is required to comply with the requirements imposed by MCR 9.119 on suspended attorneys. Commencing on the date a certified report of

nonpayment is filed, interest on the unpaid expenses shall accrue thereafter at the rates applicable to civil judgments.

(B) Reinstatement. A respondent suspended under this rule who later satisfies the reimbursement obligation, and is otherwise eligible, may apply for automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, an attorney who is suspended under this rule and who, as a result, does not practice law in Michigan for three years or more, must be recertified by the Board of Law Examiners before the attorney may be reinstated.

RULE 9.129 EXPENSES; REIMBURSEMENT

The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.

RULE 9.130 MCR 8.122 CASES; ARBITRATION; DISCIPLINE; FILING COMPLAINT BY ADMINISTRATOR

(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.

(B) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline of the attorney, it must

also be treated as a request for investigation.

(C) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator shall file the complaint on behalf of the client and prosecute it to completion without cost to the client.

RULE 9.131 INVESTIGATION OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION; INVESTIGATION OF ATTORNEY REPRESENTING RESPONDENT OR WITNESS

(A) Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply:

(1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send a copy of the answer to the person who filed the request for investigation.

(2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.

(3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter.

(4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant

the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent and the person who filed the request for investigation. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file. MCR 9.126(A) governs the release of information regarding the investigation.

(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).

(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.

If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

(B) Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.

(2) The Chief Justice shall appoint a hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115 or 9.117, as is appropriate, except that no matters shall be submitted to the

board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the Chief Justice.

(3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk.

(4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122.

(C) Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission. If the request is for an investigation of an attorney for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.

Michigan Supreme Court
Lansing, Michigan

Order
Entered: November 7, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In the matter of Reinstatement
of **EVAN H. CALLANAN, JR.**

EVAN H. CALLANAN, JR.,
Petitioner- Appellee,

v

GRIEVANCE ADMINISTRATOR, SC 101137
Appellant. ADB 92-324-RP

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this matter to the Attorney Discipline Board for reconsideration in light of this Court's decision in In re Petition for Reinstatement of Robert McWhorter, 449 Mich 130 (1995).

We do not retain jurisdiction.

Mallett, Jr. and Weaver, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____, 199_ _____